No. 2544.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM RAYMOND,
Plaintiff in Error,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error from the United States District Court for the Western District of Washington, Northern Division.

HONORABLE JEREMIAH NETERER, *Judge.*

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_____ _____*Clerk*

*By*_____ _____*Deputy.*

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STATEMENT OF THE CASE.

Plaintiff in error filed a complaint in the District Court, charging that he was an employe of the defendant in error, and, at the time of his alleged injury, engaged in certain work which he claimed was work constituting interstate commerce. He sought by such allegations to bring himself within the protection of the Federal Employers'

Liability Act. The specific charge made is found in paragraph three of the complaint, as follows:

"That on or about the 16th of April, 1914, the defendant was engaged in straightening out its main railroad line and cutting down the grades thereon so as to better facilitate the movement of interstate and foreign commerce between said City of Seattle in the State of Washington, and said City of Chicago in the State of Illinois, and other cities and states, and at said time plaintiff was employed by the defendant in said work of *driving a tunnel* to improve and better the roadbed between Horrock's Spur and Rockdale, on the defendant's main railroad line, and at said time and place and by said work, the defendant was engaged, and plaintiff was employed by said defendant in the work of improving, altering, repairing, straightening out, and bettering the roadbed, and cutting down the grades on the defendant's said railroad, so as to facilitate and make less difficult and expensive and more easy, secure, expeditious and efficient, the operation of freight and passenger trains on the defendant's said railroad line in the carriage of both passengers and freight in interstate and foreign commerce and the work of defendant, the plaintiff's labor thereon were acts and things incident to and made necessary for the constant, continuous and better operation of defendant's said trains in the carrying on of its business of interstate commerce by railroad and in work incident to such commerce and as a necessary part thereof."

Defendant in error filed its answer and denied the facts as claimed in said paragraph, as not being the true facts of the plaintiff's real employment, except the "work of driving a tunnel." In its answer the defendant in error set forth in full and in detail, the particular work which plaintiff in error was, at the time of his alleged injury, per-

forming, which facts showed that the work was solely the construction of a tunnel through the Cascade Mountains, wholly unfinished, located off the main line of the railroad and entirely disconnected therefrom, and in no manner interfering with the operation of commerce over the main line of railroad. It pleaded that the construction of said tunnel could not physically interfere with any commerce carried by the defendant in error on its main line, for the very reason that the location and the boring of the new tunnel was away from any point of connection with the main line, and, on account of being in process of construction, trains could not physically pass through, no completed hole having been bored through the mountains.

The ultimate facts set forth by the defendant in error in its second affirmative defense, state the true situation thus:

"That it is a common carrier corporation, engaged in interstate and intrastate commerce with a line of railroad running from the City of Chicago in the State of Illinois to the City of Seattle in the State of Washington; that the said main line of railroad across the State of Washington was constructed in the year 1908, and its route crossed, and now crosses, the Cascade Mountains, through and over what is known as the Snoqualmie Pass, and is constructed on the summit of said mountains or pass without the aid of a tunnel and no tunnel of any consequence exists along the line of the said railroad of said defendant as it passes over the Cascade Mountains in King County, Washington, where the alleged accident to the said plaintiff occurred; that the said railroad over said mountains

has been in operation as a through highway of interstate commerce since the year 1908 and is now in continuous operation as such; that in the year 1913 this defendant commenced the construction of a tunnel through the Cascade Mountains, the location of which tunnel is off the main line of defendant's railway and wholly disconnected therefrom, and the work of constructing said tunnel in no manner impedes, stops or interferes with the operation of the defendant's trains engaged in interstate commerce over and along its present main line of railroad; that the exact location of said tunnel is shown upon a blueprint map and survey thereof hereto attached and marked "Exhibit A" as part of this answer; that the entire length of said tunnel through said mountains, when completed, will be about fourteen thousand feet, and the outside boundaries thereof are, on said plueprint, between the points East Portal and West Portal; that the means used by the said defendant in the construction and boring of said tunnel are those ordinarily employed in tunnel work, to-wit, boring, blasting, pick and shovel work, and the carting of the material from the hole by means of dump cars hauled by mules or horses; that said plaintiff, at the time of his said alleged injury, was working as a common laborer with a pick and shovel within said partially bored tunnel, in connection with loosening of earth and rock and material, for the purpose of carrying or carting the same from the partially bored hole of said located tunnel; that he was at said instant of time working in the east end of said located tunnel, which, at that time, was bored into the mountain about one thousand feet; that at the point in the bore of said tunnel where plaintiff was working and where he received his injury, and in all other parts thereof, there was no railway track or track for the carriage of interstate commerce or commerce of any kind, constructed, and no railway engaged in any kind of commerce operated into said bore of the tunnel or up to the place where said

plaintiff worked and where he received the alleged injury; that the reason why no commerce of any kind was carried on at the point where plaintiff worked and where he received his alleged injury, or at any other point connected with the boring of said tunnel, was, that said tunnel was incomplete for any service which might or could be performed by the operation of a railroad; that it was in the process of construction, being only partially bored into said mountain, making it physically impossible for any train, cars or engines to operate into the said partially bored tunnel; that the sole employment of the said plaintiff with the said defendant and the whole work that he performed while in its employ, was that of a common laborer with pick and shovel, in assisting the boring or driving of the said located tunnel.

That said tunnel is as yet and down to this date far from completion for the operation of trains carrying commerce through the same; that when the same is completed it will be a part of defendant's said main line of railroad between Seattle, Washington, and Chicago, Illinois, defendant will construct a railway track through the same and will operate trains thereover and will, by means of said trains carry freight and passengers from the State of Washington to other states and from other states through the State of Washington to the City of Seattle and other points bordering on Puget Sound."

By way of a special plea to the jurisdiction of the court to hear and determine the controversy set forth in the pleadings, the defendant in error pleaded in its answer, as a third affirmative defence, that the particular work being done by the defendant in error, at the time of the alleged accident to the plaintiff in error, was such as was embraced within the Washington State Compensa-

tion Act then in force (Chap. 74, Laws of 1911), and that the plaintiff in error, at said time, was an employe embraced within the State Act, which Act is exclusive of all the common law or statutory remedies for the recovery of damages for personal injuries; that the plaintiff in error being embraced within the State Act, and the defendant in error, on account of the particular tunnel work being carried on, being likewise embraced within said Act, plaintiff's sole remedy for his alleged injury is through the provisions of the State Compensation Act, and, on account thereof, this action, alleged to be based on the Federal Employers' Liability Act, could not be maintained.

In reply to the facts set forth in the second affirmative defense by the defendant in error, in which it set forth the particular work being carried on by the plaintiff in error at the instant time he received his alleged injury, the plaintiff in error, by specific plea, admitted the ultimate facts, and admitted the location of the tunnel as shown on the blue print attached to the answer of the defendant in error; he then further stated in the plea that he "denies that the said matter set forth in said second affirmative defense constitutes any defense to the plaintiff's said cause of action stated in his said complaint." This last denial, of course, is no denial of any fact and is a mere statement of a legal conclusion.

In answering the plea of jurisdiction of the defendant in error, the reply of the plaintiff in error

likewise admitted the facts therein set forth, but "plaintiff denies that the said matter constitutes any defense to plaintiff's said cause of action stated in his said complaint, and plaintiff denies that such compliance with said laws and the payment by the defendant of the assessments thereunder, for the particular tunnel work in question, is any defense to the cause of action set forth in the complaint."

Thereafter, the defendant in error filed a motion for judgment on the pleadings, for the reasons:

(a) That it affirmatively appears from the admitted allegations of the complaint, the answer and the reply, that plaintiff has based his alleged cause of action upon the Act of Congress of April 22nd, 1908, and the amendments thereto, commonly known as the Federal Employers' Liability Act, and that the said plaintiff, at the time he received his alleged injury, was not employed, or engaged in interstate commerce, or performing a service of interstate commerce, so as to bring him within the terms of said Congressional Act and make defendant liable for his alleged injury;

(b) That the court is without jurisdiction of the subject matter of this action, on account of the Act of the Legislature of the State of Washington (Chap. 74, Laws 1911), relating to the compensation of injured workmen engaged in tunnel work, now in force in this State.

This motion was sustained and judgment was entered for the defendant in error, dismissing the

action out of court. This judgment necessarily resulted from the admitted facts set forth in the answer under the special defenses two and three.

ARGUMENT.

In construing the pleadings, the Court will, of course, strip the pleading of every conclusion of law and of every conclusion of fact which does not amount to the statement of an ultimate fact (*Straus vs. Foxworth*, 231 U. S. 162, 168).

It being admitted by the pleadings that the defendant in error was at the time complying with the Washington State Compensation Act, and that the particular tunnel work is such work as is embraced within that Act, it follows that whatever common law right plaintiff in error may have had to recover damages for his alleged injuries, has been taken away from him. Therefore, unless plaintiff in error can sustain his claim that he was a federal employe embraced within the Congressional Act, and not an employe over whom the State of Washington had jurisdiction, he has no direct cause of action against the defendant in error for his alleged injuries. His sole relief is through the remedy provided by the State Compensation Act.

So reduced, the sole law question involved is, whether a laborer engaged in boring a tunnel for the construction of a railroad through it, which, when completed, will be used to move interstate

commerce, is, by reason of such construction work, engaged in interstate commerce so as to bring him within the protection of the Federal Employers' Liability Act relating to the employes of interstate railroads.

We are convinced that the Supreme Court has made it plain in the *Second Employers' Liability Cases* (223 U. S. 1), the *Pederson Case* (229 U. S. 146), and the *Behrens Case* (233 U. S. 477), that a line of demarcation between federal and state employes connected with an interstate railroad must be drawn and definitely settled. In those cases we maintain that the line was finally laid out between the work of constructing the instrumentalities to be used in interstate commerce and the repair and up-keep of those instrumentalities after they had been put to actual use by the interstate railroad in moving interstate commerce. Otherwise, if no division point were made, the Act would embrace "all of the activities in any way connected with trade between the states and exclude state control over matters purely domestic in their nature," (*Hooper vs. California*, 155 U. S. 648, 655), and the Act would fall for the reasons asserted in the *First Employers' Liability Cases*, 207 U. S. 463.

Unless the line is drawn as pointed out by the Supreme Court, it is manifest that it would include not only those who are employed in commerce, but also those engaged in other departments of business. For instance, if it included workmen engaged

in the construction of things which would thereafter be used to move interstate commerce, it would cover employes laboring upon the construction of an engine. It would include the employe whose inventive genius devised an engine superior in quality to any yet in use; the man who built the parts to fit the ideas of the inventor; the man who tested out the engine to see whether it would perform the work intended for it,—all of which would precede the actual turning over of the machine to the railroad company desiring it to facilitate the movement of the interstate commerce then being carried by an inferior engine. It would similarly include those connected with constructing a better box car, a more commodious sleeper, or more fascinating dining car, intended to improve the service or facilitate the movement of interstate commerce. It will hardly be contended that any of the instances we have just enumerated are in any manner connected with interstate commerce. We are unable to perceive how the boring of a tunnel is any different from the construction of a new engine, a new box car, or any other new vehicle which may be manufactured by some independent corporation and sold to an interstate railroad company. Suppose the plaintiff in error, instead of being engaged in boring the tunnel, was laboring upon the construction of a new type of engine which would be so powerful that it could climb the mountains without the reduction of a grade and thereby obviate the boring of any tunnel through the mountains;

and, while so engaged upon the construction of this monster, he was in a building located where this tunnel was being bored (off from the line of railroad where it could not block the movement of commerce), would the plaintiff in error contend that because such engine was being especially made to obviate grades and tunnels, to facilitate the movement of commerce, although not yet in use as such, constituted an instrument of interstate commerce? Now, this engine would accomplish the very thing which counsel claims that the unfinished tunnel would accomplish when completed and trains move through it.

The illustration given is as sensible as counsel's fantastic notion of the unfinished tunnel.

In the case of *Pederson vs. Ry. Co.*, 229 U. S. 146 at 152, the Supreme Court points out the line of demarcation thus:

> "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?
>
> Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The foregoing statement relating to the construction of tracks, bridges, engines or cars, is made more significant in the light of the dissenting opinion filed in that case. The dissenting opinion applies a strict construction to the statute and main-

tains that only those employes directly connected with the transportation of interstate commerce, are embraced within the Act. Justice Lamar, who wrote the dissenting opinion, insisted that the line should be drawn between the employes actually moving the commerce and the employes engaged in other departments of the railroad's business, and, to support his construction of the statute, he makes the following observations:

"It is conceded that a line must be drawn between those employes of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce; otherwise, there is no logical reason why it should not include every agent of the Company; for there is no other test by which to determine when he must sue under the state statute and when under the Act of Congress; for, if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge, is likewise so engaged. If they are, then the man who paid them the wages and the bookkeeper who entered those payments in the accounts are similarly engaged; for they are all employed by the carrier at the work. Each contributes to its success in hauling freight and passengers."

Counsel for plaintiff in error contends that the Supreme Court in rendering the opinion in the *Pederson* case, misunderstood the facts, but we are content with the statement that the Supreme Court was fully aware of all the facts involved in the case when the opinion was written.

In the case of *Illinois Central R. R. Co. vs.*

Behrens, 233 U. S. 473 at 478, the Supreme Court specifically ruled that it makes no difference whether the employe, immediately prior to the accident, was helping to move interstate commerce, or whether immediately thereafter he would be engaged in moving interstate commerce; and it applied the test laid down in the *Pederson* case, *supra*, namely, that, at the instant time of the accident, the employe must be performing a service in interstate commerce and not in intrastate commerce or other work which would not be commerce. To make it plain, the Court said:

"Here at the time of the fatal injury, the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

Paraphrasing the last sentence to fit the case at bar, it would read thus: "That the tunnel was expected, upon its completion, to be used in interstate commerce, is immaterial under the statute." This answers every contention of counsel that the tunnel in question was being bored for the purpose of avoiding a mountain grade, snow slides and other visitations of nature.

In *Lamphere vs. Ry. Co.*, 196 Fed. 432, this

court laid down the practical test in the following language:

"The test question is: 'What is the effect upon interstate commerce (of employe's death)? Does it have the effect to hinder, delay or interfere with such commerce? Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce?"

Counsel, to make his case fit the foregoing test, makes this astounding statement:

"Suppose the trains were stopped until this work was completed waiting for its completion? Would any one then say that plaintiff was not engaged in interstate commerce? This is the real situation with regard to the tunnel in question, as shown by the statements we have quoted from the Superintendent. The commerce over the mountains was not only slow, tedious and expensive but at times the defendant was unable to carry it on, waiting all the time for the completion of this tunnel."

Of course, if the trains were stopped waiting for the tunnel to be completed, the railroad would not be engaged at all in interstate commerce or any commerce. Why would the railroad stop its trains to wait until this tunnel was bored when it had built its line and had been operating it for years before the construction of the tunnel was begun? The blue print shows that it has a line of railroad in full operation over the mountain without a tunnel. Such unreal illustrations prove

nothing in favor of the proposition urged.

Further, counsel should point out to the court which portion of the pleadings contains the alleged statement of the superintendent. It is not in the answer of the defendant in error and it cannot be found in either the complaint or the reply of the plaintiff in error.

In *Jackson vs. C. M. & St. P. Ry. Co.*, 210 Fed. 495, the District Court had before it the identical claim made by the plaintiff in error in this case. The court ruled that the work of constructing the tunnel, which was in an unfinished state, was not the work of moving interstate commerce and that the plaintiff had no right to recover.

In *Bravis vs. C. M. & St. P. Ry. Co.*, 217 Fed. 234, the Eighth Circuit Court of Appeals ruled that an employe engaged in the construction of a bridge six hundred feet distant from a railroad, on a cut-off more than a mile in length, which had never been provided with rails or used as a railroad, is not employed in interstate commerce, although his employer is so engaged and intends to use the cut-off therein when completed. It bases its opinion upon *Pederson* case, *supra; Wabasha R. R. Co. vs. Hayes*, 234 U. S. 86, and the case of *Jackson vs. Ry. Co., supra.*

In *Thomas vs Boston & Maine R. R.*, 218 Fed. 143, the District Court for the District of New Hampshire, held that an employe who was injured by a falling timber while engaged in tearing down

part of a railroad round house which had been rendered useless by fire, was not performing a service of interstate commerce at the time of his injury. This case was reversed by the Circuit Court of Appeals (219 Fed. 180) upon the ground that the District Court had misconstrued the language of the declaration, and held that the declaration set forth facts which showed that the round house was only partially damaged and the damaged portion was being removed for the purpose of reconstruction and to put the round house in the condition it was in before the fire, so that it could again be used to house the engines moving interstate commerce.

In *United States vs. C. M. & P. S. Ry Co.*, 219 Fed. 632, Judge Diedrich, of the Idaho District, held that an Engineer assigned to duty on an engine hauling a work train engaged in filling a bridge on defendant's interstate line for an uninterrupted period of fifty-one days, was not, while performing such service, connected with the movement of a train hauling interstate commerce. In support of its contention, the Government relied upon *Johnson vs. Southern Pacific Railway Company*, 196 U. S. 1, which case holds that a dining car resting and in waiting to be attached to a train moving in interstate commerce, is still an instrument of such commerce. The District Court, distinguishing that case, reasoned as follows:

"Crown was not on the 31st day of October waiting to be called on an interstate trip. So far as

appears, the defendant never expected to call him, and he never expected to be called, on an interstate trip. Whether he would ever go upon such a trip depended upon several contingencies. Suppose that in the *Johnson* case the facts had been that the dining car in question had once been used in interstate commerce, but that it had been set aside for an indefinite period for intrastate service and had been used exclusively for such service for several weeks, and was at the time its condition was called in question, being so used, and was waiting for an intrastate, not interstate, train to be made up, to which it was to be attached, and that there was no present intention of withholding it from intrastate service. Surely both the reasoning and the conclusion must have been different. This is not a case where there was a commingling of service, where the employe was one hour or one day operating in interstate and another hour or another day operating in intrastate commerce; nor is it a case where, though not in a literal sense actually engaged in moving an interstate train, the employe 'stands and waits' to actually engage in such service. If the contention of the Government is correct, an employe who has once rendered service such as is covered by the Act, must always be deemed to be within the provisions thereof, regardless of the time which has elapsed since he ceased to render such service; at least, so long as he remains in the employ of the same company."

And such is the reasonable construction of the Act by the Courts dealing with facts similar to those at bar. (*Norgard vs. Ry.*, 218 Fed. 773 (C. C. A.); *Ry. vs. Glenn*, 219 Fed. 148 (C. C. A.); *Gray vs. Ry.*, 142 N. W. 505 (Wis.); *Ry. vs. Moore*, 156 Ky. 708; *La Casse vs. Ry.*, 64 Southern, 1012 (La.).

We are unable to distinguish between the con-

struction of a tunnel and the construction of any other instrument which might, after its completion, be used in interstate commerce. If we are correct, the plaintiff in error was not, at the time he received his injury, performing a service in interstate commerce, and therewore has no right to recover under the Federal Employers' Liability Act. Not having such right, his sole remedy, as pleaded by the defendant in error in its answer, is, the compensation allowed to him under the provisions of the Washington State Compensation Act. The judgment of the District Court should be affirmed.

Respectfully submitted,

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